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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 23 2005
SRC 04 032 51201

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner initially stated that she seeks employment as a gastroenterologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner readily qualifies as a member of the professions holding an advanced degree. An additional finding of exceptional ability would have no effect on the outcome of this proceeding. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Although not required in national interest waiver cases, the petitioner has submitted Form ETA-750A, the job offer portion of an application for labor certification. Under part 13, "Describe Fully the Job to be Performed," the petitioner wrote:

- Examine and conduct tests on patients to provide information on medical condition;
- Analyze records, reports, test results or examination information to diagnose medical condition of patient;
- Prescribe or administer treatment, therapy, medication or other specialized medical care to treat or prevent illness, disease or injury;
- Explain procedures and discuss test results on prescribed treatment with patients;
- Collect records and maintain patient information such as medical history, reports and examination results;
- Refers patient to medical specialist or other practitioner when necessary;
- Plans, implements or administers health programs or standards in hospitals, business, or community for information, prevention or treatment of illness.

Under part 15, "Other Special Requirements," the petitioner wrote:

> Understands the pathophysiology of disorders of the digestive systems. Achieved competence in the clinical diagnosis and medical treatment of these disorders. Able to select, perform and evaluate procedures necessary for morphological, physiological, immunological,

> microbiological and psychosocial assessment of gastrointestinal diseases. Knowledge and participation in gastroenterological research, thesis and congress presentations.

We note that this job description includes far more emphasis on the clinical treatment of individual patients than on medical research (which merits only part of one sentence). The petitioner's past employment history, detailed on Form ETA-750B, Statement of Qualifications of Alien, consists largely of medical practice at clinics or on hospital staff, although her duties at the Federal University of Rio de Janeiro included work as a "Hemotherapy and Genetics laboratory research assistant" in addition to patient care. The petitioner did not specify her duties as a "laboratory research assistant."

In a letter accompanying the initial filing, the petitioner states:

> I am a doctor in medicine . . . who qualifies for a National Interest Waiver by virtue of my research and achievements in the Medical Community, more specifically the research of the Red Cell Membrane Protein Alterations Under Experimental Biliary Obstruction, as well as the Relationship of *Helicobacter Pilori* [sic] With Ulcers & Gastric Cancer. . . .
>
> I am one of the select few individuals in this field who has been dedicated to conducting research of gastrointestinal and related diseases. My research and work will have a major impact on improving the nation's health care, specifically the prevention of the gastrointestinal cancer and pancreatobiliar obstructive diseases.
>
> My abilities have been demonstrated through my international acclaim, recognition and substantial achievements in the field of Gastroenterology. . . .
>
> During my career, I have had the opportunity to work in Research in various areas such as: (1) Pancreas stem cells research project (Brazil and USA), (2) Band three red cell membrane proteins and their reaction within high bilirubin levels and their reversibility of their effects, (3) Medicinal plants in the world, their preservation, knowledge and their use which patients can use as alternative help after failed regular treatment.

The bulk of the petitioner's initial submission consists of copies (with translations) of various certificates that the petitioner earned in South America, reflecting medical training, participation in conferences, and the like. Such documentation may serve to establish the petitioner's professional credentials, but they do not, by themselves, establish eligibility for the national interest waiver.

The petitioner submits witness letters, which the petitioner has divided into "letters from previous employers" and "reference letters." The "letters from previous employers" attest only to the petitioner's experience and competence. They appear to be fairly routine letters of recommendation, routinely issued to departing employees. The letters do not focus on the petitioner's research skills or accomplishments, or indicate that the petitioner's research findings have been especially significant within the field. We note that the petitioner has submitted the same translation for two different letters; thus, one letter that refers to employment from "*8*

de Enero al 22 de Abril de 1.985" is accompanied by a translation that reads "from June 1994 to this date" (although the letter is dated April 25, 1985).

The "reference letters" include a letter dated August 25, 2003, Professor Guenter J. Krejs of Karl Franzens Universität, who states:

> I became acquainted with [the petitioner] and her work at several congresses that I attended as speaker and chairman in South America, where I saw her as a young and enthusiastic physician working in gastrointestinal research. . . . She has subsequently changed to the field of neurosciences and based on my knowledge of her abilities and accomplishments, I am sure that she will do very well in her new field.

Considering that the petitioner continues to refer to herself as a gastroenterologist, and her description of her own work does not involve neuroscience, Prof. Krejs' statement is puzzling.

Dr. Frank Mari, an associate professor at Florida Atlantic University, where the petitioner was studying at the time of filing, states:

> I am familiar with [the petitioner's] previous research and believe she has an exceptional ability in the area of gastroenterology. She has various publications in this area. . . .
>
> We are very interested in [the petitioner's] work and believe it would be in our best National Interest as it is focused on improving health care and preventing diseases.
>
> I would also be interested in working with [the petitioner] in our University. Her research could potentially lead to the successful reduction of gastroenterological diseases affecting in [sic] our country.

Considering that Dr. Mari has "known [the petitioner] since 2000," when the petitioner arrived at Florida Atlantic University, this letter does not support the petitioner's claim that she has earned an international reputation as a researcher. The remainder of the letter is very general, asserting that the petitioner is a productive researcher in an important field. The intrinsic merit of the petitioner's field of endeavor is a necessary step, but not a sufficient one, to demonstrate eligibility for the national interest waiver. The waiver is a special, added benefit that is not granted to every member of the professions with an advanced degree, or to every alien of exceptional ability. Hence, attestations of exceptional ability cannot suffice to qualify the petitioner for the waiver sought.

Other "reference letters" differ little from many of the "letters from previous employers," in that they very briefly describe positions the petitioner has held or training the petitioner has completed, and offer favorable but vague assessments of the petitioner's skills and personal character. None of the letters describe in any detail the petitioner's work as a gastroenterologist or researcher, much less explain the impact of that research.

On February 25, 2005, the director issued a request for evidence, stating that the petitioner's "contributions . . . to the field of gastroenterology have not been shown to exceed those of her peers." The director also noted Prof. Krejs' assertion that the petitioner has moved from gastroenterology to neuroscience, which "contradicts the beneficiary's statement that she plans to continue research in the area of gastroenterology." The director concluded by stating that, whether the petitioner seeks to work in gastroenterology or in neuroscience, the petitioner's "past record must show the ability to serve the national interests of the U.S. to a substantially greater degree than others would in the same field."

In response, counsel states:

> [The petitioner's] incursion into the field of neuroscience was encouraged when it was discovered that Band-3 protein membrane found in the neuronal or mitochondrial membrane also suffered the same alterations she had discovered in red blood cell membrane. . . . Her decision to enter the field of neuroscience was further supported by the fact that her hypothesis is that hyperbilirubin, which is secreted by the liver, also has deleterious effects in the neuronal cells. Her hypothesis has been confirmed by recent research by Britow, Ostrow and other neuroscience researchers. This shows that her research is at a stage much further ahead of other current researchers in the field of neuroscience. Part of the reason being that [the petitioner] has a much broader knowledge of the subject since she has delved in it from many different perspectives, such as from a gastroenterologist's point of view. . . .
>
> [T]here have been extremely few researchers who have specialized in both gastroenterology and neuroscience.

None of the above explains why the petitioner herself, when describing her own intended future work in the United States, did not mention neuroscience at all. Instead, the petitioner stated "I intend to continue my research in the area of gastroenterological diseases," and indicated her job title as "gastroenterologist" on the Form I-140 petition. Also, counsel's reference to "researchers who have specialized in both gastroenterology and neuroscience" presumes that the petitioner has, in the past, specialized in both, whereas her professional credentials do not show any prior specialization in neuroscience.

In any event, the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We must view the evidence on its own merits, rather than on potentially self-serving interpretations of that evidence.

The petitioner submits abstracts of articles by other researchers, addressing bilirubin-induced neurotoxicity and other subjects that touch on both gastroenterology and neurology. There is no indication of the degree to which these articles relied on the petitioner's earlier work. The articles show that there are other research groups studying this issue. It remains to be addressed why it is in the national interest for this petitioner, in particular, to receive permanent immigration benefits. Her choice of research specialty is not, by itself, a strong basis for a waiver. The petitioner submits a list of her own published work. This list does not indicate

that the petitioner has published anything since her arrival in the United States in 2000; her listed published work all predates her recent interest in neuroscience.

Professor Robert P. Vertes of Florida Atlantic University states:

> [The petitioner] has not only excelled in the area of neuroscience, but has provided an invaluable insight into the relation between neuroscience and gastroenterology. [The petitioner] is involved in a very promising area of research, where there are very few qualified researchers who can not meet the demand for individuals who conduct research in both areas. There are currently no researchers who straddle both disciplines at this university. This is an area that could have a deep impact in the understanding of disorders currently affecting parts of the U.S. population. However, investigation has been minimal since there are not enough researchers who are willing to and capable of excelling in both areas of neuroscience and gastroenterology. . . .
>
> [The petitioner's] research on bilirubin has been well conducted and has shown exciting preliminary results on why and how it occurs. . . . The research and procedures take a lot of time and dedication on behalf of the investigator. It can not be done in a short period of time.

If "there are very few qualified researchers" with this dual specialization, a shortage of such dual specialization would appear to be a favorable factor in seeking a labor certification, assuming both specializations to be indispensable basic qualifications for a given position, and assuming that a researcher was permanently needed for such research. As it is, the petitioner identifies herself as a graduate student at Florida Atlantic University; her nonimmigrant student visa allows her to carry on this research while she remains a student.

The director denied the petition, stating that the petitioner has not shown that she stands above other qualified workers in her field, and that a shortage of qualified workers is generally grounds for approving, rather than waiving, a labor certification. The director found that the petitioner had "submitted very limited evidence of prior achievements."

Counsel, on appeal, states that a national interest waiver is justified because "valuable research time" would be lost while an application for labor certification is pending. As noted above, the petitioner is already conducting this research on a nonimmigrant basis. The petitioner has not explained or demonstrated how labor certification would delay the petitioner's ability to work, even as a nonimmigrant. Also, the assertion that certain areas of research are too important to be delayed by labor certification is, in effect, an argument for a blanket waiver that Congress has not created for workers in the petitioner's field.

Counsel argues that the petitioner "has that intangible quality that makes a scientist able to discover new facts about biological mechanisms that are the basis for therapeutic developments for human disease." Whatever counsel's subjective assessment of the petitioner's research abilities, the record contains no persuasive evidence that the petitioner's past work as a researcher has been more influential or beneficial than that of countless other trained professionals in her field. Simply listing articles and patents cannot settle this issue,

because at issue is not whether the petitioner is producing original work, but rather the significance of that work. There is no evidence that other researchers have cited the petitioner's publications, or that her patented work has had a discernible impact within her field. The witness letters are from individuals who have worked closely with the petitioner, and therefore the letters do not indicate that the petitioner's work has attracted significant attention from others in the field.

In a new letter, Prof. Vertes states that the petitioner "has progressed quickly during the past two years that she has worked in my laboratory." Prof. Vertes describes "recently begun" research projects that had never before been mentioned in the record. The beneficiary of an immigrant visa petition must be eligible at the time of filing; subsequent developments cannot cause a previously ineligible beneficiary to become eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Also, we note that the newly-described projects concern Alzheimer's disease and memory formation; Prof. Vertes does not even mention gastroenterology in his new letter, let alone explain how the above areas relate to gastroenterology. Considering that the petitioner had initially filed her petition as a self-described "gastroenterologist," listing a detailed job description that heavily stressed one-on-one clinical treatment of patients rather than research, we cannot find that the new letter from Prof. Vertes has anything to do with the petitioner's initial claims. If anything, it gives us reason to believe that the petitioner has abandoned gastroenterology altogether. Prof. Vertes also does not indicate that the petitioner has continued to research hyperbilirubinemia, even though the petitioner's past work relating to that disorder is a cornerstone of counsel's appellate brief.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.